

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

28448

FILE: B-213351**DATE:**

June 5, 1984

MATTER OF: Gregory A. Robertson**DIGEST:**

1. Where contracting agency did not authorize the submission of oral offers, it properly refused to consider an oral best and final offer which was confirmed by a written proposal postmarked prior to but received after the closing date for receipt of best and final offers.
2. Contention that a mailed best and final offer may have been late due to government mishandling is without merit where the only documentary evidence of time of receipt of the offer indicates that the offer was received at the government installation after the closing date for receipt of offers.

Gregory A. Robertson protests the contracting officer's refusal to consider either his late written offer or his oral confirmation of that offer submitted in response to the Department of Agriculture's call for best and final offers under request for proposals (RFP) No. 00-83-R-79. We deny the protest.

Agriculture issued the solicitation on August 24, 1983 seeking proposals to direct 52 one-half hour sessions of an agency sponsored television program. Robertson submitted an initial offer of \$10,400; the only other offeror, Stephen Howard, submitted an initial offer of \$11,700. Agriculture found both proposals technically acceptable and sent letters dated September 16 to both offerors requesting that they submit best and final offers by 3:00 p.m. on September 26. The protester called an agency contract specialist a few minutes prior to the deadline and asked whether his best and final offer had been received. Upon learning that it had not, he informed the specialist that his best and final price was \$9,100. The agency received Robertson's written best and final offer of \$9,100--which had been postmarked on September 22--at 12:45 p.m., September 27. The agency decided that it

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could not consider this offer and awarded a contract to Howard based on his best and final offer of \$10,000.

Robertson argues that his best and final offer should have been accepted because nothing prohibits acceptance of oral offers and because Agriculture had in the past accepted Robertson's oral offers.

Unlike the Defense Acquisition Regulation (§ 3-805.3 (d)) and the new Federal Acquisition Regulation (§ 15.611 (b)), which specify that best and final offers shall be in writing, the Federal Procurement Regulations (FPR), which are applicable here, are silent on the point. Generally speaking, however, solicitations issued by the government anticipate that offers submitted in response to the solicitations will be in writing. Only on occasion will the government seek oral offers, such as when exigent circumstances so require, see, e.g., Bethesda Research Laboratories, Inc., B-190870, April 24, 1978, 78-1 CPD ¶ 314, or for other reasons. See Robert P. Maier, Inc., 55 Comp. Gen. 833 (1976), 76-1 CPD ¶ 137; Kleen-Rite Corporation, B-209474, May 16, 1983, 83-1 CPD ¶ 512. The government will also sometimes seek oral quotations. See Applied Materials, Inc., 56 Comp. Gen. 93 (1976), 76-2 CPD ¶ 419; FPR, 41 C.F.R. § 1-3.603-2(b)(1) (1983). In situations when the government does not authorize the submission of oral proposals or the oral modification of proposals, generally they cannot be accepted. See Sturm Craft Co., 57 Comp. Gen. 127 (1977), 77-2 CPD ¶ 444; Plant Facilities and Engineering Inc., B-201618, April 22, 1981, 81-1 CPD ¶ 310.

Here, neither the agency's letter requesting best and final offers nor the solicitation authorized the submission of oral offers. Instead, it is clear that the solicitation and the contracting officer contemplated the submission of written offers. The solicitation instructions that offers should be submitted in sealed envelopes and addressed to the office specified clearly envision a written submission. While one could argue that this instruction applied only to submission of initial proposals, we think that in the absence of contrary information from the contracting officer, offerors could not assume that the acceptable method of submission for best and final offers would be any different than that specified for initial offers. Compare, Kleen-Rite Corporation, supra, and Applied Materials, Inc., supra, where the contracting officer solicited written

offers and quotations initially but then requested oral revised proposals. Moreover, while the contracting officer's letter requesting best and final offers did not explicitly state that the offers had to be in writing, it did state that the offers had to be received by a specified time and that a "late submission will be handled in accordance with" the solicitation's late proposals clause. That clause, of course, envisions written proposals.

Robertson asserts that acceptance of his proposal here would be consistent with the regulatory provision that permits agencies to accept telegraphic bid modifications which are received by telephone from the receiving telegraph office and later confirmed in writing by the telegraph company. See FPR, 41 C.F.R. § 1-2.304(a). The point is, however, that consideration of oral offers in this procurement was not authorized. Moreover, in the situation covered by the regulation the telephone call comes from a disinterested third party who must then confirm the call by sending a copy of the telegraphic message received, thus minimizing the potential for abuse of the competitive system.

In short, we believe the agency properly rejected Robertson's oral offer.

Regarding Robertson's contention that the agency should have accepted his oral offer because it had previously accepted his oral offer, we note that the procurement to which Robertson refers was conducted under small purchase procedures, where oral quotations are permitted. See FPR, 41 C.F.R. § 1-3.603-2(b)(1). Therefore, we see no relevance of the prior procurement to the situation here.

Robertson also contends that he could have submitted a timely written offer if the agency had adequately informed him that his oral offer was not acceptable. The contracting officer reports that when Robertson telephoned with his best and final price, the contract specialist "indicated to him that she did not think she could accept it verbally because this was" not being conducted under small purchase procedures. Robertson does not dispute that statement. Also, as indicated above, we do not believe that offerors are free to assume that oral best and finals will be accepted when written proposals are sought initially and contracting officials make no mention of oral best and

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final offers. Thus, we believe that under the circumstances Robertson should have known that it was at least questionable as to whether the oral offer would be accepted. Consequently, if he was able to deliver a timely written offer, he should have done so. By not doing so, he assumed the risk that his oral offer would be rejected.

Finally, the protester speculates that his written offer may have been late due to government mishandling and complains that the contracting officer failed to investigate this question.

Under the late proposal clause of the solicitation, a late best and final offer cannot be considered unless it was received prior to award and the late receipt was due solely to mishandling by the government after receipt at the government installation. The solicitation further provides that the only acceptable evidence to establish the time of receipt at the government installation is the time-date stamp of such installation on the proposal wrapper or other documentary evidence of receipt maintained by the installation.

The only evidence in the record before us as to the time of receipt of Robertson's proposal is a manual notation on the envelope containing Robertson's best and final offer indicating the time and date that it was received. This notation indicates that the offer was received after the deadline for its submission. Consequently, there is no basis for considering the question of mishandling. See Tom Shaw, Inc., B-209018, Feb. 3, 1983, 83-1 CPD ¶ 75.

The protest is denied.

for Milton J. Rowland
Comptroller General
of the United States